Supreme Court, U.S.
FILED

No. _____ 10-248 JUN 14 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RAYSHAWN C. ABRAM,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Douglas County District Court *State v. Rayshawn C. Abram*, the Douglas County Prosecutor appeared before the District Court Judge and made an oral motion to set the bond in the amount of $1,000,000 on December 4, 2009 and on December 17, 2009 to set the preliminary hearing date without the presence of the defendant and without the presence or prior notification of these hearings on the prosecutor's oral motions to the defendant or the defendant's attorney in violation of the defendant's constitutional rights.

Whether it violates the United States Constitution to set a bond in the amount of $1,000,000 on the ex parte oral motion of the prosecutor and to set a preliminary hearing on the ex parte oral motion of the prosecutor in violation of the ethical rules and without prior notification or the presence of the defendant or the defendant's attorney of record to be present.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Rayshawn Abram, petitions the Court for a Writ of Certiorari to review a denial of the Petition for Further Review of the Nebraska Supreme Court (entered April 14, 2010) affirming the Nebraska Court of Appeals dismissal of his appeal (entered March 12, 2010).

OPINIONS BELOW

The Nebraska Court of Appeals declined to issue a written opinion because they ruled the appeal of the case based upon the ex parte communication in setting the bond of $1,000,000 by the judge and the prosecutor in violation of federal law was not a final appealable order. (App. 1.) The Nebraska Court of Appeals issued a dismissal of the appeal on March 12, 2010. (App. 1.)

The Nebraska Supreme Court declined to issue a written opinion and they denied a petition for further review in violation of federal law because they ruled Petitioner's appeal is not a final appealable order. The Nebraska Supreme Court denied a petition for further review on April 14, 2010. (App. 11.)

In *Kansas v. Marsh*, 548 U.S. 163 (2006) the Supreme Court has jurisdiction to **review constitutional rights even when the state-court proceedings are not complete where the federal claim has been finally decided**. *Cox Broadcasting*

Corp. v. Cohn, 420 U.S. 469, 481 (1975). *Kansas v. Marsh*, 548 U.S. 163 (2006).

The right to a fair bond hearing based upon the ex parte communication between the judge and the prosecutor affects the constitutional rights of the Petitioner, other defendants in Douglas County and other defendants throughout the nation.

STATEMENT OF JURISDICTION

The denial of the Petition for Further Review of the Nebraska Supreme Court was entered on April 14, 2010. (See App. 11.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions are listed in the appendix.

STATEMENT OF THE CASE

In *State of Nebraska v. Rayshawn C. Abram Doc. 182 No. 334* in the Douglas County District Court African American Defendant Rayshawn C. Abram was charged with Count I Attempted Murder in the First Degree; Count II Use of a Deadly Weapon to Commit a Felony; Count III Criminal Conspiracy;

and Count IV Tampering With a Witness in the Information on December 3, 2009.

In this case, the Douglas County Prosecutor appeared before the District Court Judge and made an oral motion to set the bond in the amount of $1,000,000 on December 4, 2009 and on December 17, 2009 the same prosecutor made an oral motion to Judge Peter C. Bataillon to set the preliminary hearing date without the presence of the defendant and without the presence or prior notification of these hearings to the defendant or the defendant's attorney in violation of the defendant's constitutional rights. (App. 5, App. 7.)

A state court of last resort, the Nebraska Supreme Court, has decided an important federal question in a way that conflicts with relevant decisions of this Court by denying the defendant an opportunity to be heard at a bail hearing with the assistance of his attorney before an impartial judge. The federal question of the right to bail and the right to assistance of counsel was reviewed by the Nebraska Court of Appeals on March 12, 2010 (App. 1) and the Nebraska Supreme Court. (App. 11.) The prosecutor has set another preliminary hearing on June 16, 2010 without prior notification to the defense attorney and an opportunity to be heard. (App. 9.)

On December 7, 2009, the Office of the Douglas County Attorney dismissed this same case, *State v. Rayshawn Abram CR 09 8710* in the Douglas County Court (defense attorney objected to the dismissal

after the case was dismissed but it was not part of the transcript) to file the case in the Douglas County District Court before the Honorable Judge Peter C. Bataillon so that they could have a judge of their choice or judge shop.

The attorney of record was known to the Prosecutor and easily accessible to appear in Court before the oral motion to set the bond and the oral motion to set the preliminary hearing.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE ALLOWED BECAUSE AN EX PARTE ORDER SETTING THE BOND WITHOUT THE PRESENCE OF THE DEFENDANT OR THE DEFENDANT'S ATTORNEY, IN VIOLATION OF THE ETHICAL RULES, AFFECTS THE DEFENDANT'S CONSTITUTIONAL RIGHTS OF DUE PROCESS OF LAW UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE NEBRASKA CONSTITUTION ART. I §§ 3, 8, 9, 10, 11, 12 AND THIS PRECEDENT COULD AFFECT EVERY CRIMINAL DEFENDANT IN THE UNITED STATES.

In *Kansas v. Marsh,* the Supreme Court has jurisdiction to review the Kansas Supreme Court's judgment under 28 U.S.C. § 1257 which authorizes

review of a State's final judgment when a state statute's validity is questioned on federal constitutional grounds, and **it permits review even when the state-court proceedings are not complete where the federal claim has been finally decided** and later review of the federal issue cannot be had, whatever the case's outcome, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975). *Kansas v. Marsh*, 548 U.S. 163 (2006).

A person who has been arrested and has not been indicted has a Fourth Amendment constitutional right to a judicial determination of whether probable cause exists for continued detention before an impartial judge. *Gerstein v. Pugh*, 420 U.S. 103 (1975). The State must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest. *Id.*

The State did not provide a fair and reliable determination of probable cause because ex parte communication of the judge and prosecutor in violation of Defendant Abram's constitutional rights after the Douglas County Attorney moved the case to the District Court in an attempt to judge shop in the District Court to have a better chance to prevail in the preliminary hearing and set the one million dollar bond. *Id.*

The impartiality and decorum of the court has been impaired by the prosecutor's violation of CHAPTER 3 ATTORNEYS AND THE PRACTICE OF LAW ARTICLE 5 NEBRASKA RULES OF PROFESSIONAL CONDUCT. Impartiality of the tribunal §§ 3-503.5(a)(1) seeking to influence a judge . . . and (2) ex parte communication with the judge regarding the Prosecutor setting the bond and judge shopping by dismissing the action in Douglas County Court and docketing the action with the judge with whom she had ex parte communication and the defendant was denied a meaningful preliminary hearing in violation of the defendant's rights of due process of law under the Fourth Amendment, Fifth Amendment, Sixth Amendment, Eighth Amendment and Fourteenth Amendment to the United States Constitution and Art. I, §§ 3, 8, 9, 10, 11, 12 of the Nebraska Constitution.

The judge violated Judicial Code § 5-203. Canon 3. A Judge shall perform the duties of the judicial office impartially (7)(a)(i)(ii) by scheduling a preliminary hearing without the presence of the defendant. The Court did not notify the defendant or his attorney to allow the defendant or the defendant's attorney an opportunity to be heard on the million dollar bond and the preliminary hearing in violation of the defendant's constitutional rights.

II. THE DEFENDANT HAS AN EIGHTH AMENDMENT RIGHT TO BAIL BEFORE AN IMPARTIAL JUDGE WHEN THE DEFENDANT MAY ALLEGE JUDICIAL AND PROSECUTORIAL MISCONDUCT BASED UPON EX PARTE DISCUSSION OF THE CASE WHEN IT AFFECTS THE CONSTITUTIONAL RIGHTS TO BAIL AND TO DUE PROCESS OF LAW UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE NEBRASKA CONSTITUTION ART. I §§ 3, 8, 9, 10, 11, 12.

The Supreme Court has held that courts have the power to detain prior to trial arrestees charged with certain serious felonies if the Government demonstrates by clear and convincing evidence, after an adversary hearing, that no release conditions "will reasonably assure . . . the safety of any other person and the community." *United States v. Salerno*, 481 U.S. 739 (1987).

The pre-trial detention is not penal but regulatory and the liberty interest implicated after an arrest are outweighed by the government's overwhelming interest in community safety. *United States v. Salerno*, 481 U.S. 739 (1987). The judge must determine after a hearing that no condition of release would reasonably assure the appearance of the person and the safety of the community. *Id.* At the bail hearing, the defendant has the right to testify, the right to

present other evidence and the right to counsel and the right to cross-examine witnesses. *Id.*

The accused is presumed innocent and bail before an impartial judge prevents the infliction of punishment before conviction. *Id.* The Defendant Abram was not given a bail hearing promptly in front of an impartial judicial officer in violation of his constitutional rights. *Id.*

The decision to set bail in the amount of one million dollars based upon the ex parte communication with the judge and the prosecutor without a hearing and notice to the defendant Abram and the Defendant's Attorney of Record affects the constitutional rights of Defendant Abram to a fair bond hearing and the right to testify, the right to present other evidence, the right to counsel and the right to cross-examine witnesses in front of an impartial judge in violation of the Eighth Amendment, due process of law under the Fourth Amendment, Fifth Amendment, Sixth Amendment and Fourteenth Amendment to the United States Constitution and Art. I, §§ 3, 8, 9, 10, 11, 12 of the Nebraska Constitution. *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990); *United States v. Salerno*, 481 U.S. 739 (1987).

CONCLUSION

Wherefore the Petitioner requests this court grant the Petition for Writ of Certiorari to allow the Petitioner the opportunity to stop this practice of setting the bond and ordering a preliminary hearing in violation of the constitutional rights of the Petitioner.

Dated this 18th day of August, 2010.

Respectfully submitted,

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March 12, 2010

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IN CASE OF: A-10-000054, State v. Rayshawn C. Abram

The following internal procedural submission or filing by a party:

Misc. Submission to Court – Jurisdiction
submitted or filed 02/18/10

has been reviewed by the court and the following order entered:

Appeal dismissed. See Neb. Ct. R. App. P. § 2-107(A)(2). An order setting a date for a preliminary hearing is not a final, appealable order as it does not affect a substantial right. Neb. Rev. Stat. § 25-1902 (Reissue 2008); see State v. Engleman, 5 Neb. App. 485, 560 N.W.2d 851 (1997) (to create finality in a

criminal case, it is necessary that there be a final judgment of conviction followed by a sentence).

Respectfully,

CLERK OF THE
SUPREME COURT AND
COURT OF APPEALS

IMPORTANT NOTICE

Due to the reduced number of cases awaiting submission to the Supreme Court and Court of Appeals, and as part of the courts' continuing efforts to reduce case-processing time, **future requests for brief date extensions will be closely scrutinized**. See Neb. Ct. R. App. P. §§ 2-106(F) and 2-109(A). Pursuant to Neb. Ct. R. App. P. § 2-110(A), if an appellant's default for failure to file briefs is issued, appellant "is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief in response to the notice of default subjects the appeal to dismissal."

PLEASE BE ADVISED THAT THESE RULES WILL BE STRICTLY ENFORCED.

AP DOCKET	NO.	WITNESSES
DISTRICT COURT DOUGLAS COUNTY THE STATE OF NEBRASKA VS RAYSHAWN C. ABRAM		SARAH SCHRAMM R. OSTERMEYER #1836 OPD *M. SULLIVAN #1727 OPD

DIRECT INFORMATION

CHARGE

ATTEMPTED MURDER IN THE FIRST DEGREE; USE OF A DEADLY WEAPON TO COMMIT A FELONY; CRIMINAL CONSPIRACY; TAMPERING WITH A WITNESS

FILED: December 3, 2009

JOHN M. FRIEND, CLERK

BY: _____
DEPUTY

RECORDED: JOURNAL PAGE

DONALD W. KLEINE
COUNTY ATTORNEY

AR#K1024418 RB#V38044
090141581 090141582
090141583 090141584

ASSIGNED TO JUDGE: _____
BDB:DP1 20033

_____

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,	)	
Plaintiff	)	DOC. 182 NO. 334
vs.	)	ORDER SETTING BOND
RAYSHAWN C. ABRAM,	)	
Defendant.	)	

THIS MATTER is before the Court on the oral motion of the County Attorney for an order setting bond in the above-captioned matter. The Court, being fully advised in the premises, finds that such an order should be entered.

IT IS THEREFORE ORDERED that the defendant's bond shall be set at $1,000,000.00 and will remain set at $1,000,000.00 until further Order of the Court.

DATED this 4th day of December, 2009.

BY THE COURT:

/s/ Peter C. Bataillon
Hon. Peter C. Bataillon
District Court Judge

PREPARED AND
SUBMITTED BY:

/s/ Brenda D. Beadle

Brenda D. Beadle
Chief Deputy County Attorney
100 Hall of Justice
Omaha, Nebraska 68183
(402) 444-7040

C: Tim Ashford

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. RAYSHAWN C. ABRAM, Defendant.	)	DOC. 182 NO. 334 **PRELIMINARY HEARING ORDER**

THIS MATTER is before the Court on the oral motion of the County Attorney for an order setting the preliminary hearing in the above-captioned matter. The Court, being fully advised in the premises, finds that such an order should be entered.

IT IS THEREFORE ORDERED that the preliminary hearing is scheduled on the 22nd day of January, 2010 at 9:00 p.m. in Courtroom No. 13 on the 4th floor of the Hall of Justice, before the Honorable Judge Peter Bataillon.

IT IS FURTHER ORDERED that the Defendant, is required to be present at the hearing.

DATED this 17th day of December, 2009.

BY THE COURT:

s/ Peter C. Bataillon
Hon. Peter C. Bataillon
District Court Judge

PREPARED AND
SUBMITTED BY:
Brenda D. Beadle
Chief Deputy County Attorney
100 Hall of Justice
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IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff	)	DOC. 182 NO. 334
vs.	)	PRELIMINARY HEARING ORDER
RAYSHAWN C. ABRAM, Defendant.	)	

THIS MATTER is before the Court on the oral motion of the County Attorney for an order setting the preliminary hearing the above-captioned matter. The Court, being fully advised in the premises, finds that such an order should be entered.

IT IS THEREFORE ORDERED that the preliminary hearing is scheduled on the 16th day of June, 2010 at 10:00 a.m. in Courtroom No. 13 on the 4th floor of the Hall of Justice, before the Honorable Judge Peter Bataillon.

IT IS FURTHER ORDERED that the Defendant, is required to be present at the hearing or a capias will be issued for his arrest.

DATED this 5th day of May, 2010.

BY THE COURT:

s/ Peter C. Bataillon
Hon. Peter C. Bataillon
District Court Judge

PREPARED AND
SUBMITTED BY:
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April 14, 2010

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IN CASE OF: A-10-000054, State v. Rayshawn C. Abram

The following internal procedural submission or filing by a party:

Pet. of Applt, for Further Review **submitted or filed** 03/23/10

has been reviewed by the court and the following order entered:

Petition for further review denied.

Respectfully,

CLERK OF THE
SUPREME COURT AND
COURT OF APPEALS

IMPORTANT NOTICE

Due to the reduced number of cases awaiting submission to the Supreme Court and Court of Appeals, and as part of the courts' continuing efforts to reduce case-processing time, **future requests for brief date extensions will be closely scrutinized**. See Neb. Ct. R. App. P. § 2-106(F) and 2-109(A). Pursuant to Neb. Ct. R. App. P. § 2-110(A), if an appellant's default for failure to file briefs is issued, appellant "is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief in response to the notice of default subjects the appeal to dismissal."

PLEASE BE ADVISED THAT THESE RULES WILL BE STRICTLY ENFORCED.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor;** and to have the Assistance of Counsel for his defense.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT

Due process clause of the Fifth Amendment . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

Due process clause of the Fourteenth Amendment . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;

EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Equal Protection Clause of the Fourteenth Amendment . . . nor deny to any person within its jurisdiction the equal protection of the law.

Nebraska Constitution Art. I Sec. 3. Due process of law. No person shall be deprived of life, liberty or property, without due process of law.

Nebraska Constitution Art. I Sec. 8. Habeas corpus. The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law.

Nebraska Constitution Art. I Sec. 9. Bail; fines; imprisonment; cruel and unusual punishment. All persons shall be bailable by sufficient sureties,

except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Nebraska Constitution Art. I Sec. 10. Presentment or indictment by grand jury; information. No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; Provided, That the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law, abolish, limit, change, amend, or otherwise regulate the grand jury system.

Nebraska Constitution Art. I Sec. 11. Right to Confrontation

Sec. 11. Rights of accused. In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have

process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

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28 U.S.C. § 1257(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.